Supreme Court, U.S.
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No. 05-1622

IN THE

Supreme Court of the United States

OCTOBER TERM, 2006

LOUIS NEWELL
Petitioner,

v.

MASSACHUSETTS DEPARTMENT OF
MENTAL RETARDATION
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF MASSACHUSETTS

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Supreme Judicial Court of Massachusetts correctly concluded that a litigant was not eligible for attorney's fees as a prevailing party under 42 U.S.C. §1983 and the *Buckhannon* decision, where no oral or written orders for judicial relief were made?

2. Whether a factual finding that a litigant is a member of a class under a consent decree, unaccompanied by a finding that his rights as a class member were violated, or by a remedial order, is sufficient judicial imprimatur for a fee award under *Buckhannon*?

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RESPONDENT'S BRIEF IN OPPOSITION

Pursuant to Supreme Court Rule 15, the respondent Massachusetts Department of Mental Retardation ("DMR") submits this brief in opposition to the petition for certiorari.

Decisions Below

The opinion of the Supreme Judicial Court of Massachusetts is reported at 446 Mass. 286, 843 N.E.2d 1084 (2006), and is included in Appendix A to the petition at pages 1a-34a. The earlier decision of the Superior Court of Massachusetts is unreported, and is included in Appendix B to the petition at pages 35a-65a.

Statement of the Case

An accurate statement of the case appears in the opinions of the lower courts, reproduced in Appendix A and Appendix B of the petition. For reasons stated below, the petition does not accurately state the facts of the case or the rulings of the lower courts.

Reasons for Denying the Writ

I. RULE 15.2 OBJECTION: THE PETITION MATERIALLY MISSTATES THE FACTS AND LAW

The respondent objects to the Court's consideration of the questions allegedly presented by the petition on the ground (Rule 15.2) that the petition misstates the facts, the findings and rulings of the trial court, and the holding of the Supreme Judicial Court. When the misstatements are stripped away, it becomes apparent that the questions allegedly presented for this Court's consideration are not, in fact, presented by this case.

A. *No Judicial Imprimatur Warrants a Fee Award.*

The petition alleges that a split exists among the circuits as to what kind of an order for judicial relief will establish the "judicial imprimatur" required by the decision in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001). Whether or not a split in authority exists, it is irrelevant to the facts of the present case.

1. No Order Was Ever Made.

The Supreme Judicial Court found and ruled, as had the trial court, that no court order, oral or written, had ever been made in this case granting any form of relief to the petitioner. Contrary to the petition's misstatements, the court did not rule that oral orders cannot provide "judicial imprimatur" for *Buckhannon* purposes. *Newell v. Department of Mental Retardation*, 446 Mass. 286

(2006). Pet. 1a-34a.

Before *Buckhannon* was decided, the trial court found the plaintiff to be a "prevailing party" and awarded legal fees, solely on the basis of the later-discredited catalyst theory. Pet. 16a, 43a-47a. The judge expressly found that "the plaintiff vindicated his rights without obtaining court-ordered relief." Pet. 16a, 47a (emphasis added). The fee award was based on a change in the legal relationship between DMR and the petitioner when they agreed on the services to be provided and the wording of his Individual Service Plan ("ISP"). The court found that this agreement had come about as "the product of pressures exerted by the present lawsuit," not as the result of any judicial order. Pet. 46a.

After *Buckhannon* was decided, the judge vacated the fee award and reaffirmed that it had been made solely on the basis of the catalyst theory, and for that reason no longer had any legal basis. Pet. 16a-17a.

The alleged oral orders on which the petition relies came during colloquies on February 10, February 17 and March 29, 2000 between the trial judge and the parties and their counsel. In the case of such a colloquy, where no written order is made, the trial court's later finding that no oral order for relief was made is entitled to considerable deference on appeal. The Supreme Judicial Court cited the First Circuit standard of review of such a finding:

> We review a district court's grant or denial of attorneys' fees for manifest abuse of discretion, mindful that the district court has an intimate knowledge of the nuances of the underlying case. Such deference is particularly

> appropriate where, as here, the correctness of the court's decision depends in large part on the proper characterization of its own statements. Clearly, the district court is in the best position to determine whether its statements . . . should be considered as the functional equivalent of a judicial order within the meaning of *Buckhannon*.

New England Regional Council of Carpenters v. Kinton, 284 F.3d 9, 30 (1st Cir. 2002), cited in the decision below at Pet. 20a-21a & n.28.

2. The Court Denied Fees Because No Order was Made, Not because an Oral Order is Insufficient.

The Supreme Judicial Court held that the trial judge's oral statements from the bench were not orders at all. At the February and March 2000 hearings, the judge sought to play the role of mediator in bringing the parties to agreement on the only disputed issue, the petitioner's demand for the addition of two specific services to his ISP, Pet. 22a. The judge resolved the dispute by cajoling and sometimes directing DMR to *reach agreement* with petitioner on specific terms. Id.

The judge made no order of any kind, either oral or written, that decided the dispute or prescribed the services to be provided and incorporated in the ISP. Id. By the time of the March 29 hearing, the parties had already agreed on the services and the amended ISP wording. The trial court for that reason dismissed the petitioner's motion for injunctive relief as moot. Pet. 43a, 45a. Further, "[N]o settlement agreement was drafted or executed, and

no order incorporating any such terms was entered." Pet. 23a.

The Supreme Judicial Court expressly ruled that an oral order can be enforced by contempt, but concluded from its review that the transcript "contains nothing resembling an order that the department implement specific services by April 30," Pet. 29a-30a, and "it does not appear that the judge ever ordered anything." Pet. 31a (emphasis added). The court said that the trial judge had indicated "that she was merely 'asking' the department to do what the department had, on its own, already 'agreed to.'" Id. "At most, the judge had exerted pressure on the department to prevent it from backing off its prior agreement with respect to those two modifications." Id.

The petition materially misstates these facts. The Supreme Judicial Court ruled that no order had been made, not that an oral order cannot provide judicial imprimatur for Buckhannon purposes. It did not reach any issue which has split the circuits. No question about the effect of an oral order is presented for this Court's consideration.

3. The Petition Selectively Quotes and Misstates the Decision Below.

The petition misstates the holding of the Supreme Judicial Court. Arguing that oral orders had changed the legal relationship between the parties and thereby constituted "judicial imprimatur," the petition incorrectly asserts: "The court still erroneously found that oral orders could never provide the 'judicial imprimatur.'" Pet. 22. Petitioner calls this alleged finding "a misstatement of the controlling federal law. (S.C. Rule 10)." Pet. 20. These assertions misstate the lower court's decision.

The misstatement is most striking in the petitioner's selective quotations from the decision below. The Supreme Judicial Court, after noting post-*Buckhannon* decisions among the circuits discussing whether a judgment on the merits or a court-ordered consent decree are the only forms of relief that meet the "judicial imprimatur" requirement, distinguished the present case as not presenting an inter-circuit dispute:

> Whatever the ultimate resolution of that question, no court has concluded that oral statements by a judge, ***sometimes couched in hortatory rather than directive terms and*** not reduced to writing, are sufficient to satisfy the requirement of a 'judicial imprimatur.' **To the extent a claim similar to the one the plaintiff makes here has been asserted, it has been rejected. See, e.g., *New England Regional Council of Carpenters v. Kinton, supra,* (judge's statements in 'extended colloquy' with defendant were not 'functional equivalent of a judicial order' where judge entered 'no explicit order compelling, or even leading to' change in defendant's behavior).**

(emphasis added). Pet. 20a-21a, citing and following *Smith v. Fitchburg Public Schools*, 401 F.3d 16, 23 (1st Cir. 2005) and *New England Regional Council of Carpenters v. Kinton*, 284 F.3d 9, 30 (1st Cir. 2002).

The petition quotes only a portion of one sentence of this language, omitting all of the boldfaced text above. Its omission of the phrase, "hortatory rather than directive terms," and of the two following sentences (reviewing courts defer to a trial judge's

characterization of her own remarks in an oral colloquy) changes what the court actually said -- that no order or the functional equivalent of an order was in fact made -- into a spurious question -- whether oral orders can ever give rise to "judicial imprimatur."

The latter question is not presented by this case, and the Supreme Judicial Court made no ruling on it.

B. *The Finding of Ricci Class Membership Did Not Materially Alter the Legal Relationship of the Parties*

The petition misleadingly characterizes the plaintiff's lawsuit as an attempt to enforce the consent decree in *Ricci v. Okin*, 823 F.Supp. 984 (D. Mass. 1993). It cites the trial court's finding that petitioner is a member of the *Ricci* class and argues that this confers "prevailing party" status on him. Petitioner misstates the effect of the finding. Pet. 15-20, 23.

The court made a bare factual finding of class membership, unaccompanied by any order for relief or by a finding that petitioner's *Ricci* rights had been violated. Pet. 38a. The Supreme Judicial Court held that the finding of class membership did nothing to materially alter the relationship which the *Ricci* consent decree had previously established between petitioner and DMR. Pet. 7a n.11, 26a-28a. As the court stated, "The plaintiff either is or is not a Ricci class member; there is no judicial imprimatur that changed the legal relationship of the parties." Pet. 28a.

Petitioner alleges that the finding will give him a procedural advantage over non-*Ricci* DMR clients if DMR reduces or ends his services in the future, because he will be able to bypass the state administrative appeal process and proceed directly to court

in a contempt action. Pet. 22. The argument assumes that the finding of class membership is an order. Because no order of any kind was ever made, Pet. 31a, *ipso facto* there would be no basis for a contempt action based on the finding of class membership. Pet. 29a. Moreover, the possibility of relief in the future would not support a fee award now.

The argument also misstates the terms of the consent decree, which expressly requires that "individual ISP disputes shall be enforced solely through the state ISP process." *Ricci v. Okin*, 823 F. Supp. at 988, ¶7(a).[1] Nothing in the consent decree supports the petitioner's claim that the finding of class membership allows him to bypass those procedures by a contempt action.

Nothing turned on whether the petitioner is a member of the *Ricci* class. This case for that reason is distinguishable from the decided "enforcement" cases cited in the petition. Pet. 16-19.

II. THIS CASE PRESENTS NO SIGNIFICANT ISSUE OF FEDERAL LAW REQUIRING RESOLUTION BY THIS COURT

The petition presents nothing more than the petitioner's disagreement with the trial judge's factual finding that she had

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[1] The consent decree provides "special eligibility" status for class members, which entitles them to the same services as DMR clients with "general eligibility," with two exceptions not here relevant. See *Newell*, 446 Mass. at 305 n.34, Pet. 27a. Special eligibility clients have the same procedural rights as general eligibility clients, as set forth in the Massachusetts Code of Regulations, 115 CMR 6.31. Neither of the "special eligibility" exceptions for *Ricci* clients expands these procedural rights.

made no order granting him relief, and with the Supreme Judicial Court's deference to that finding in affirming the denial of fees. The petition cites no authority contrary to the holdings of the First Circuit and the Supreme Judicial Court that give deference to a trial judge's characterizations of her own oral statements. There is no circuit split and no "misstatement of the controlling federal law" by the Supreme Judicial Court, as petitioner asserts. Pet. 20.

The Supreme Judicial Court's holding that the mere finding of *Ricci* class membership did not materially alter the parties' relationship also presents no circuit split, and no material issue of federal law requiring resolution by this Court.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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